Supreme Court, U.S.
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95-2044
No.

In The

Supreme Court of the United States

October Term, 1995

LARRY RAY and JACQUELINE RAY,

Petitioners,

vs.

POLICE OFFICER BLAKE WILLETT,

Respondent.

Petition for a Writ of Certiorari to the New York State Supreme Court, Appellate Divison for the Second Department

PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED

1. Where a jury finds that an on-duty police officer initiates police action, falsely arrests a civilian, and uses excessive force after making the arrest, is the New York courts' holding that the officer did not act "under color of law" within the meaning of 42 U.S.C. § 1983 in conflict with the decisions of this Court?

LIST OF ALL PARTIES

Since the trial court dismissed the claims against Defendants Metropolitan Transportation Authority and the Long Island Railroad, the Appellate Division for the Second Department affirmed, they are not listed as parties in this proceeding.

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Petitioners, Larry Ray and Jacqueline Ray, respectfully petition for a Writ of Certiorari to review unreported the Decision and Order of the New York State Supreme Court, Appellate Division for the Second Judicial Department.

OPINIONS BELOW

The order denying motion to appeal to the New York State Court of Appeals, dated March 21, 1996 is reproduced *infra* (Appendix A, 1a).

The opinion of the New York State Supreme Court, Appellate Division for the Second Judicial Department (Appendix B, 2a) is unreported.

The bench opinion of the New York State Supreme Court : Kings County is reproduced *infra* (Appendix C, 7a).

STATEMENT OF JURISDICTION

The New York State Court of Appeals denied Petitioners' motion to appeal on March 21, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTE INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof of the deprivation of any rights, privileges, or immunities secured by

> the constitutions and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Larry Ray was a maintenance worker for Ogden Allied. His duties were to maintain the floors of the Long Island Railroad ("LIRR") level of the Pennsylvania Station. On the night of July 21, 1988, Mr. Ray reported for work at 11:00 p.m. and began stripping the LIRR's floors. He was approached by a woman who asked him to open the bathrooms which were closed by the LIRR at 10:00 p.m. each evening. Mr. Ray had been instructed by his supervisor, Mr. Ibrahim to send all people who ask to use the bathrooms to either a police officer or to the LIRR police station to get a key.

Mr. Ray saw Police Officer Blake Willett ("Officer Willett") standing a few feet away and directed the woman to him. A short time later, Officer Willett approached Mr. Ray and started arguing with him. He used obscene language in directing Mr. Ray never to send any person to him asking for the key to the bathroom. The argument continued, and Mr. Ray's supervisor, Mr. Ibrahim told Mr. Ray to go to lunch.

Mr. Ray left to get his lunch, and was pursued by Officer Willett who then took Mr. Ray to remote area in the station. Along the way, Office Willett told Mr. Ray several times that he was a police officer and that Mr. Ray had to show him respect.

Once they reached the remote area of the LIRR station, Office Willett started to "tussle" with Mr. Ray. After a few minutes, Mr. Ray started to walk away, and Officer Willett announced that Mr. Ray was under arrest. He pushed Mr. Ray to

the floor and summoned a passing LIRR employee to hold Mr. Ray while Officer Willett handcuffed him. The LIRR employee, Mr. Randolph Balmaceda, immediately left, and then Officer Willett starting beating Mr. Ray about the face, stomach and back. He then smashed Mr. Ray's head into a concrete wall several times.

Officer Willett stopped beating Mr. Ray only because Mr. Alvin Champion, another LIRR employee, arrived in the area to get a jeep. Officer Willett then took Mr. Ray to the police station and booked him for disorderly conduct and resisting arrest.

After the booking procedures began, Officer Willett met with his supervisor, Lieutenant Firth, and among other statements, said, "I fucked up, I can't handle these people pressuring me". In response to Officer Willett's comments, Lieutenant Firth ordered Mr. Ray's handcuffs removed, released him from custody, and had another officer take him to the hospital.

On May 22, 1989, Mr. Ray and his wife, Jacqueline Ray, filed an action in the New York Supreme Court : Kings County against the Metropolitan Transportation Authority ("MTA"), the LIRR and Officer Willett for false arrest, assault, and use of excessive force.

On August 9, 1990, Justice Irving Aronin of the Supreme Court for Kings County granted Petitioners' motion to serve an amended complaint to include an action pursuant to 42 U.S.C. § 1983.

Trial commenced on February 10, 1993. At the end of the trial, the jurors, responding to written interrogatories, rendered a verdict in the sum of Eight Hundred Sixty Thousand ($860,000) Dollars against Officer Willett upon the causes of

action for assault and false imprisonment and in favor of Officer Willett upon the cause of action under 42 U.S.C. § 1983. The jury rendered a verdict in favor of the LIRR on all causes of action.

The jurors responded to written interrogatories in pertinent part as follows:

> 1. Did defendant POLICE OFFICER BLAKE WILLETT commit a battery against Plaintiff LARRY RAY?
>
> Answer: Yes.
>
> 2. Did defendant POLICE OFFICER BLAKE WILLETT falsely arrest/ imprison Plaintiff LARRY RAY?
>
> Answer: Yes.
>
> 3A. Did POLICE OFFICER BLAKE WILLETT commit the acts of which Plaintiff complains?
>
> Answer: Yes.
>
> 3B. Did POLICE OFFICER BLAKE WILLETT use excessive force or unnecessary force under the circumstances?
>
> Answer: Yes.

3C. Did POLICE OFFICER BLAKE WILLETT act under Color of Law?

Answer: No.

Immediately after trial, the Petitioners made a motion to have the verdict set aside as to the 42 U.S.C. § 1983 action in favor of Respondent Blake Willett, and the verdict in favor of the LIRR. The court denied Petitioners' motions.

A post-trial traverse hearing was held on April 4, 1993, to determine if service of process upon Officer Willett was proper under the first complaint served on July 20, 1989. The court held that service had not been properly made as to the original complaint. The amended complaint including the cause of action under 42 U.S.C. § 1983 was properly served on Officer Willett.

In denying Petitioners' motion to have the verdict set aside as to 42 U.S.C. § 1983, the court stated:

> It seems to this Court that if we accept Mr. Gutman's [attorney for Plaintiffs] arguments with respect to Color of Law, then no assault by a police officer and no false imprisonment by a police officer on duty anytime could possibly not result in a 1983 violation. So that if we accept his argument ever [sic] and every false imprisonment by an on duty police officer if he guessed wrong and the jury would hold that he guessed wrong, would also withhold the 1983 violation. I don't buy that logic. I see nothing inconsistent with this jury's finding of that although there was an assault and false

> imprisonment admitted there was no 1983 violation.[1]

Petitioners timely appealed the trial court's decision to the Appellate Division for the Second Judicial Department. On November 27, 1995, the Appellate Division affirmed the trial court's decision in a written opinion in which the court stated in pertinent part:

> To prevail on a claim of a civil rights violation under 42 USC § 1983, a plaintiff must demonstrate that the defendant was acting "under color of state law" at the time of the acts in question *(see, Zarcone v. Perry, 78 AD2d 70, affd 55 NY2d 782, cert denied, 456 US 979)*. In determining whether a police officer is acting under color of State law, the nature of the act complained of is controlling *(see, Revene v. Charles County Commns., 882 F.2d 870)*. Here, the initial confrontation came about because Willett was present in Penn Station in his capacity as a police officer. However, when he took Ray from the LIRR level to a secluded area and beat him, Willett was not acting in his official capacity or exercising his responsibilities pursuant to State law *(see, Oakes v. Cooke, 858 F.Supp. 330)*. Therefore, the court properly declined to set aside the jury verdict.

Petitioners made a timely motion to appeal the decision of the Appellate Division, Second Department to the New York

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1. Respondent Officer Willett pleaded affirmatively that he was acting as a police officer and lawfully arrested Mr. Ray.

State Court of Appeals. The motion was denied on March 21, 1996.

REASONS FOR GRANTING THE WRIT

This Court has ruled that "misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). *Accord, Monroe v. Pape*, 365 U.S. 167, 185 (1961).

In this case, it is not disputed that Officer Willett was on duty on the night of July 21, 1988, and that he initiated a discussion with Mr. Ray over the LIRR's bathroom policies. Nor is it in dispute that Officer Willett announced several times that he was a police officer, and Mr. Ray should respect him. Finally, it is not in dispute that Officer Willett arrested, handcuffed and severely beat Mr. Ray while in custody, then took him to the LIRR Police station and booked him. These acts and pronouncements on the part of Officer Willett are acts done "under color of law", and a misuse of the police powers granted to him by the State of New York.

The trial court's denial of Petitioners' motion to set aside the verdict rendered under the 42 U.S.C. § 1983 action is not consistent with the decisions of this Court, and the federal circuit courts where the jury found, and the facts are not disputed, that Officer Willett falsely imprisoned Mr. Ray and used excessive force in making the arrest while Mr. Ray was in custody.

In affirming the trial court's decision, the Appellate Division's opinion dangerously narrows the meaning this Court has given to actions taken under "color of law".

Whether a police officer is acting under color of state law within the meaning of 42 U.S.C. § 1983 is a federal question and state courts hearing Section 1983 cases must be guided by federal law. The Appellate Division's opinion is in direct conflict to this Court's decision in *Monroe v. Pape, supra,* and the Second Circuit Court of Appeals' decision in *Rivera v. La Porte,* 896 F.2d 691 (1990).

In this case, because the courts of New York are in direct conflict with the clear mandate of federal case law, an innocent citizen has been deprived of a civil remedy under 42 U.S.C. § 1983 for an egregious and violent abridgement of his Fourth Amendment right to be free from an unlawful arrest accomplished with excessive force.

Mr. Ray is illiterate, but he was very proud that he held his job with Ogden Allied for seven (7) years and was able to take care of his family. As a result of the beating by Officer Willett, Mr. Ray suffers from chronic headaches, and sustained a severe shoulder injury which required surgery. He has been unable to find any kind of steady employment with medical benefits since Officer Willett beat him.

I.

THE APPELLATE DIVISION'S OPINION CONSTRUING THE MEANING OF ACTIONS TAKEN "UNDER COLOR OF LAW" FOR 42 U.S.C. § 1983 LIABILITY IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND THE FEDERAL CIRCUIT COURTS.

United States v. Classic, supra, 313 U.S. 326 (1941) established the meaning to be given to the phrase "under color of law": "misuse of power, possessed by virtue of state law and

made possible only because the wrongdoer is clothed with authority of state law, is 'action taken under color of state law.' " *Id.* at 326.

That meaning was reaffirmed in *Screws v. United States*, 325 U.S. 91 (1945); *Williams v. United States*, 341 U.S. 97 (1951); and *Monroe v. Pape*, 365 U.S. 167 (1961) (*overruled in part on other grounds*), *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978).

The federal courts guided by the meaning given to the phrase "under color of" state law in *Classic, supra*, have scrutinized the acts done by the individual police officers in determining whether or not there is 42 U.S.C. § 1983 liability.

The law stated by the Appellate Division in this case sets a dangerous precedence for New York State Courts interpreting the phrase "under color of law" for the purpose of holding police officers accountable for their actions within the meaning of 42 U.S.C. § 1983.

The Appellate Division's opinion, rather than analyzing the acts of Officer Willett using the federal case decisions as a guide, holds that a police officer who is on duty, initiates a police action, announces that he should be respected as a police officer, arrests a civilian, places him in handcuffs and then severely beats him in a remote area, may escape liability under 42 U.S.C. § 1983 for depriving a citizen of his Fourth Amendment rights.

This opinion is in direct conflict with this Court's analyses of misuse of authority which constitutes actions taken "under the color of law" in *Williams, supra*, and *Screws, supra*.

The Appellate Division's opinion is also in direct conflict with the Second Circuit's Opinion in *Rivera v. La Porte*, 896 F.2d 691 (1990), *supra*.

In *Rivera, supra,* the court did not focus on the fact that the officer was off-duty or that the argument that precipitated the arrest in that case was private, but on the acts the officer committed in response to the initial argument.

The Court stated:

> He was carrying handcuffs issued by the New York City Department of Corrections and an "off duty" revolver. He identified himself as a police officer (or, according to some testimony, as a peace officer) in making the arrest, he used the handcuffs, he placed Rivera in a police car, and he accompanied him throughout the evening to the local precinct, the hospital, and central booking. Though the dispute that precipitated the arrest was private, the response including the use of excessive force, was unquestionably action under color of law.

Id. at 695.

In this case, the dispute that precipitated the arrest concerned the implementation of LIRR policy, and in patent conflict with *Rivera, supra*, the Appellate Division held: "However, when he took Ray from the LIRR level to a secluded area and beat him, Officer Willet was not acting in his official capacity or exercising his responsibilities pursuant to state law (see, *Oakes v. Cook,* 858 F.Supp. 330)."

II.

THE MISUSE OF AUTHORIZED STATE POWER BY A POLICE OFFICER IS ACTION "TAKEN UNDER COLOR OF LAW" WITHIN THE MEANING OF 42 U.S.C. § 1983.

This Court has made it very clear in a number of decisions that public officials who misuse the power they were authorized to exercise is action taken "under color of law".

In *Screws v. United States, supra,* 325 U.S. 91 (1945), this Court stated:

> In the present case, as we have said, the defendants were officers of the law who had made an arrest and who by their own admissions made the assault in order to protect themselves and to keep the prisoner from escaping, *i.e.*, to make the arrest effective. That was a duty they had under Georgia law. *United States v. Classic* is, therefore, indistinguishable from this case so far as "under color of" state law is concerned. In each officers of the State were performing official duties; in each the power which they were authorized to exercise was misused... Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal

> pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea.

Id. at 110-111. In this case, Officer Willett was on duty and in uniform. He initiated the argument with Mr. Ray and persisted in keeping it going although Mr. Ray tried to walk away. He informed Mr. Ray several times as he took him to a remote location of the LIRR Pennsylvania Station that he demanded respect as a police officer. When they arrived at the loading area, Officer Willett used his authority as a police officer to place Mr. Ray under arrest when he tried to walk away. Officer Willett summoned a LIRR employee to assist him in handcuffing Mr. Ray. After Mr. Ray was in handcuffs, Officer Willett repeatedly smashed his head into a concrete wall, and beat him about the chest, back and face. Officer Willett stopped beating Mr. Ray, only when another LIRR employee approached the area. Then, Officer Willett took Mr. Ray to the police station and booked him.

The Appellate Division found that Officer Willett acted in his official capacity when he confronted Mr. Ray over a disputed interpretation of LIRR bathroom policy. Therefore, Officer Willett's conduct in arresting and beating Mr. Ray were not acts of an officer committed in the "ambit of [his] personal pursuits." *Screws v. United States, supra,* 325 U.S. at 111. This was action taken "under color of law".

The jury's answers to special interrogatories in this case,

found that Officer Willett made a false arrest, assaulted Mr. Ray and used excessive force against him while he was in custody. Therefore, although the jury found that Officer Willett was not acting "under color of law", proper application of federal law to the jury's answers to special interrogatories bound the trial judge to grant Petitioners' motion for judgment against Officer Willett under 42 U.S.C. § 1983.

By affirming the trial court's decision, the Appellate Division denied Mr. Ray a civil remedy upon the ground that these Fourth Amendment violations were not perpetrated under "color of law" within the meaning of 42 U.S.C. § 1983. That opinion cannot be reconciled with the meaning this Court gave to the phrase "under color of law" in *United States v. Classic, supra,* 313 U.S. 299 (1941).

CONCLUSION

This is a compelling case on its facts and provides this Court with an important opportunity to redress a conflict between New York State law and federal law in the application of misuse of state power under 42 U.S.C. § 1983.

This reason justifies granting a Writ of Certiorari to review the judgment of the New York Supreme Court, Appellate Division for the Second Judicial Department.

Dated: Forest Hills, New York
June 19, 1996

Respectfully submitted,

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APPENDIX A — ORDER OF THE COURT OF APPEALS, STATE OF NEW YORK DATED MARCH 21, 1996

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-first day of March 1996

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding*

2-10 Mo. No. 69

Larry Ray, et al.,

Appellants,

v.

Metropolitan Transportation Authority, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT ENTERED NOVEMBER 27, 1995

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

0260Z
Y/jv

Argued — November 2, 1995

____AD2d____

WILLIAM C. THOMPSON, J.P.
MYRIAM J. ALTMAN
GABRIEL M. KRAUSMAN
GLORIA GOLDSTEIN, JJ.

93-03397

Larry Ray, et al., appellants,

v

Metropolitan Transportation Authority, defendant; Long Island Rail Road, et al., respondents.

DECISION & ORDER

Gutman & Gutman, Forest Hills, N.Y. (S. Mac Gutman of counsel), for appellants.

Appendix B

Chesney, Murphy & Moran, Westbury, N.Y. (Peter J. Verdirame of counsel), for respondent Long Island Rail Road.

Curtis, Zaklukiewicz, Vasile, Devine & McElhenny, Merrick, N.Y. (Eugene Patrick Devany of counsel), for respondent Blake Willett.

In an action, *inter alia*, to recover damages for battery, false imprisonment, and deprivation of civil rights, the plaintiffs appeal from a judgment of the Supreme Court, Kings County (Vinik, J.), entered May 20, 1993, which dismissed the complaint (1) against the defendant Long Island Rail Road, upon a trial ruling granting the motion of that defendant to dismiss the fifth, sixth, and seventh causes of action insofar as asserted against it for failure to make out a prima facie case, and upon a jury verdict as to the remaining causes of action against that defendant, and (2) against the defendant Blake Willett, after a hearing, for lack of personal jurisdiction.

ORDERED that the judgment is affirmed, without costs or disbursements.

The plaintiff Larry Ray, a maintenance worker at Penn Station, and the defendant Blake Willett, a Long Island Rail Road (hereinafter LIRR) Police Officer, became involved in a physical altercation when Ray directed a commuter seeking restroom access to Willett. The evidence showed that Willett took Ray to a secluded loading dock, where Willett removed his uniform shirt, bullet-proof vest, and holster, turned off his radio, and beat and handcuffed Ray. Willett then brought Ray to the LIRR police station, where Ray was released by Willett's supervisor.

Appendix B

The plaintiffs commenced this action against Willett and the LIRR seeking, among other things, damages for battery, false arrest and imprisonment, negligent retention, and violation of his civil rights under 42 USC § 1983. The court dismissed the negligent retention and civil rights claims against the LIRR for failure to make out a prima facie case. The jury found Willett liable for battery and false arrest and imprisonment, but found that he had not violated Ray's civil rights. Following a post-trial hearing on the issue of process, the court concluded that the service of the summons and complaint upon Willett was defective and dismissed the complaint as against him. The court also denied the plaintiffs' motion to set aside the jury's determination that Willett was not acting within the scope of employment or under "color of state law" (42 USC § 1983). We find no error in the court's rulings.

The court properly dismissed the negligent retention claim since the evidence failed to establish that the LIRR had knowledge of Willett's propensity for violence (*see, Kirkman v Astoria Gen. Hosp.*, 204 AD2d 401; *Santamarina v Cintrynell*, 203 AD2d 57). Contrary to the plaintiffs' contention, certain prior civilian complaints filed against Willett were properly excluded from evidence since they were found to be unsubstantiated or were not of such a nature as to make Willett's behavior in this instance foreseeable.

Nor was Willett's conduct chargeable to the LIRR under the doctrine of respondeat superior. That doctrine renders an employer vicariously liable for a tort committed by an employee while acting within the scope of his employment, even if the duties were done irregularly or with disregard of instruction (*see, Riviello v Waldron*, 47 NY2d 297). However, liability will not attach where, as here, the tort is committed solely for personal

motives of the employee unrelated to the furtherance of the employer's business (*see, Adms v New York City Tr. Auth.*, 211 AD2d 285, *lv granted* __ AD2d __ [1st Dept., July 20, 1995]; *Kirkman v Astoria Gen. Hosp., supra*). Willett's act of taking Ray to a secluded area and beating him was a gross departure from his normal duties and fell well outside the scope of his employment.

To prevail on a claim of a civil rights violation under 42 USC § 1983, a plaintiff must demonstrate that the defendant was acting "under color of state law" at the time of the acts in question (*see, Zarcone v Perry*, 78 AD2d 70, *affd* 55 NY2d 782, *cert denied*, 456 US 979). In determining whether a police officer is acting under color of State law, the nature of the act complained of is controlling (*see, Revene v Charles County Commns.*, 882 F 2d 870). Here, the initial confrontation came about because Willett was present in Penn Station in his capacity as a police officer. However, when he took Ray from the LIRR level to a secluded area and beat him, Willett was not acting in his official capacity or exercising his responsibilities pursuant to State law (*see, Oakes v Cooke*, 858 F Supp 330). Therefore, the court properly declined to set aside the jury verdict. Nor was the LIRR liable under 42 USC § 1983 for the acts of Willett since the plaintiffs failed to show any official "policy or custom" of the LIRR which caused a constitutional violation or any inadequate training or supervision on the part of the LIRR evidencing a deliberate indifference to individual rights (*see, City of Canton, Ohio v Harris*, 489 US 378, 383; *Monell v Dept. of Social Servs.*, 436 US 658; *Jackson v Police Dept. of City of N.Y.*, 192 AD2d 641, *lv denied* 82 NY2d 658, *cert denied* __ US __, 114 SCt 1370).

The plaintiffs do not dispute that service upon Willett at 232 Wright Street was defective since Willett had moved from that

address more than a year before the attempted service. Rather, the plaintiffs contend that Willett was estopped from contesting service. The trial court correctly rejected the plaintiffs' estoppel argument since the documents proffered by the plaintiffs were dated eight months prior to the alleged service and, contrary to the cases relied upon by the plaintiffs (*see, Squire v Greenberg*, 173 AD2d 362; *Poet v Kolenda*, 142 AD2d 633), there was no evidence that Willett willfully misrepresented his address or violated any statutory notification requirement. There is no obligation on the part of a defendant to keep potential plaintiffs apprised of his whereabouts (*see, Cuomo v Cuomo*, 144 AD2d 331).

We have considered the plaintiffs' remaining contentions and find them to be academic or without merit.

THOMPSON, J.P., ALTMAN, KRAUSMAN and GOLDSTEIN, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

APPENDIX C — EXCERPTS OF TRANSCRIPTS OF PROCEEDINGS

[Commencing at page 44]

. . . Railroad which the Court dismissed at the end of Plaintiff's case.

MR. GUTMAN: And I had an exception to that dismissal.

THE COURT: We're not going to deal with that here. That's on the record, that's there. We'll just deal with your application to dismiss — by the way we'll do that too and that motion is denied. If you are renewing your motion at the end to — renewing your motion to reargue the Court's dismissal of the 1983 claim against the Long Island Railroad the Court adheres to it's original determination.

We are dealing now with your application to dismiss the 1983 claim against the defendant, Blake Willet. I have read all of the papers, Counselors. Substantially your claim is that the jury was inconsistent having found—having answered yes to the two questions and having answered no to the question of whether the Office acted on your argument that it's inconsistent and you are arguing that the Court should not even have [45] submitted that the jury. The Court should have directed a verdict on that issue.

MR. GUTMAN: Also, your Honor, because the issue was admitted into the pleadings of Blake Willet.

THE COURT: I am a little perplexed with that argument. We know that under our system of juris prudence. Parties are entitled to the pleadings in the alternative. Parties are entitled to say I wasn't negligent but if I was you were also negligent. You can't now say that because you pleaded in the alternative and you are

asking for contribution either from the plaintiff or from a co-defendant. You cannot argue now well since you are asking for contribution you say you were also negligent and therefore you want a direct verdict.

MR. GUTMAN: Judge, I can just say that Blake Willet did not plead in the alternative as far as the lawfulness of the arrest, that I pleaded consistently that the arrest was both lawful and he was acted in the scope of his employment and at the time he made the [46] arrest. I don't see how the Court can escape the conclusion that those issues were formerly admitted by Officer Willet and his pleading both in response to the allegation that the Officer acted in the scope of his employment and as an affirmative defense in which Officer Willet claimed affirmatively that the arrest was lawful.

THE COURT: I am going to deny that application to set aside the jury's verdict on the basis of an affirmative defenses raised by the defendant. You have an exception to that. With respect to the balance of that application it seems to this Court and Counsel we don't need argue on it. I will just put it on the record and we'll assume that whoever the decision is against objects and accepts and your arguments are already noted in your document. It seems to this Court that if we accept Mr. Gutman's arguments with respect to color of law then no assault by Police Officer and no false imprisonment by any Police Officer on duty at any time could possibly not result in a 1983 [47] violation. So that if we accept his argument ever assault and every false imprisonment by and on duty Police Officer if he guessed wrong and the jury would hold that he guessed wrong would also withhold the 1983 violation. I don't by that logic. I see nothing inconsistent with this jury's finding of that although there was an assault and false imprisonment admitted there was no 1983

violation. The parties themselves having nothing to do with a color of law so that your application to set aside the jury's verdict with respect to the 1983 violation against officer Blake Willet is denied. You have an exception and you have an exception to that ruling. You are also asking that the verdict of the jury with respect to the respondeate superior as far as the Long Island Railroad where the jury found that there is no respondeate superior you're asking that this verdict be set aside and that the Court direct a verdict in favor of the plaintiff against the defendant Long Island Railroad. Again that motion is denied.

APPENDIX D — JUDGMENT DATED MAY 5, 1993

At a Trial Part, Part 8, held in and for the County of Kings, at the Courthouse thereof located at 15 Willoughby Street, Brooklyn, N.Y. on the 5th day of May, 1993.

PRESENT:

HONORABLE JULIUS VINIK
J.S.C.

INDEX NO.: 18693/89

LARRY RAY and JACQUELINE RAY,

Plaintiffs,

- against -

METROPOLITAN TRANSPORTATION AUTHORITY, LONG ISLAND RAILROAD and POLICE OFFICER BLAKE WILLETT,

Defendants.

JUDGMENT AFTER TRIAL

The issues in this case have come on to be heard at IAS Part 8 of this Court, Kings County, at the Courthouse at 15 Willoughby Street, Brooklyn, New York, before Justice Julius Vinik with a jury. Plaintiffs appeared by their counsel,

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GUTMAN & GUTMAN, Defendant, LONG ISLAND RAILROAD, appeared by its counsel, CHESNEY, MURPHY & MORAN, ESQS., and Defendant, BLAKE WILLETT, appeared by his counsel, CURTIS, ZAKLUKIEWICZ, VASILE, DEVINE & MC ELHENNY, ESQS., and the parties having stipulated to the discontinuance of Plaintiffs' action against Defendant, METROPOLITAN TRANSPORTATION AUTHORITY. The issues were tried, and the jury in response to written interrogatories rendered a verdict in favor of Plaintiffs in the sum of $860,000 against Defendant BLAKE WILLETT upon their causes of action for assault and false imprisonment, and in favor of Defendant BLAKE WILLETT upon their cause of action alleging a violation of 42 U.S.C. Section 1983, and in favor of the Defendant, LONG ISLAND RAILROAD upon all issues, as follows:

AS TO DEFENDANT, BLAKE WILLETT:

1. Did defendant Police Officer Blake Willett commit a battery against plaintiff Larry Ray? A: Yes.

2. Did defendant Police Officer Blake Willett falsely arrest/imprison plaintiff Larry Ray? A. Yes.

3a. Did Police Officer Blake Willett commit the acts of which plaintiff complaints? A. Yes.

3b. Did Police Officer Blake Willett use excessive or unnecessary force under the circumstances? A. Yes.

3c. Did Police Officer Blake Willett act under color of law? A. No.

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AS TO DEFENDANT, LONG ISLAND RAILROAD:

4. Did defendant Police Officer Blake Willett act in furtherance of the business of defendant Long Island Railroad and within the scope of his authority, as a Police Officer? A. No.

DAMAGES:

5a. Plaintiff is entitled to recover for those injuries which were a proximate cause of the defendant's actions, the sum of $810,000.

5b. State separately the amount awarded for the following items of damages, if any, up to the date of your verdict:

1. Loss of earnings	$110,000
2. Pain and suffering to date	$700,000
Total	$810,000

5c. State separately the amount awarded for the following items of damage, if any, to be incurred in the future:

1. Loss of earnings	None
2. Pain and suffering including the permanent effect of the injury	None

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AS TO PLAINTIFF JACQUELINE RAY'S CLAIM FOR LOSS OF SERVICES:

6. Plaintiff Jacqueline Ray is entitled to recover for the loss of services of plaintiff Larry Ray, the sum of $50,000.

With the parties' consent, the Court reserved decision upon the affirmative defense interposed by BLAKE WILLETT alleging lack of personal jurisdiction and, following the verdict, and

After trial, plaintiff having moved this Court for an order striking defendant, BLAKE WILLETT's affirmative defense of lack of personal jurisdiction, and for an order pursuant to CPLR Section 4404 setting aside the jury's verdict and entering judgment in favor of Plaintiff against Defendant, BLAKE WILLETT for violation of Plaintiff's rights secured under 42 U.S.C. 1983, and setting aside the jury's verdict and entering judgment in Plaintiffs' favor against the LONG ISLAND RAILROAD, and Defendant, LONG ISLAND RAILROAD, having cross-moved for an order reducing the jury's verdict as excessive and awarding to said defendant attorneys fees pursuant to 42 U.S.C. Section 1985 and

UPON reading and filing the Plaintiffs' motion and the Affirmation of S. MC GUTMAN, ESQ. dated the 2nd day of March, 1993 in support thereof; the Cross-Motion of the Defendant, LONG ISLAND RAILROAD and the Affirmation of PETER J. VERDIRAME, ESQ. dated the 3rd day of March, 1993 in support of the Cross-Motion and in opposition to the Plaintiffs' motion; the Affidavit in Partial Opposition to Plaintiffs' motion of Eugene Patrick Devany, dated the 8th day of March, 1993; and the Affirmation in Opposition to Cross-

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Motion and in Reply to Opposition to Motion of S. MAC GUTMAN, ESQ. dated the 9th day of March, 1993; and

The parties having appeared before the Court by their counsel on March 19, 1993 and April 2, 1993 for a hearing upon their motions and the Court having conducted a hearing and taken the testimony under oath of Gustav Blumberg, a licensed process server, and

After due deliberation the Court having rendered a decision on the record denying Plaintiffs' motion for a directed verdict and finding that Plaintiffs failed to make personal service upon BLAKE WILLETT.

NOW, upon motion of GUTMAN & GUTMAN, attorneys for Plaintiffs, it is

ORDERED, that Plaintiffs' motion to strike the Affirmative Defense of lack of personal jurisdiction interposed by defendant, BLAKE WILLETT, is in all respects denied, and it is further

ORDERED, that the Plaintiffs' motion to set aside the verdict against Plaintiffs' cause of action charging that defendant, BLAKE WILLETT, violated Plaintiffs' rights secured under 42 U.S.C. Section 1983 is in all respects denied, and it is further

ORDERED, that Plaintiffs' motion to set aside the verdict in favor of the Long Island Railroad is in all respects denied, and L.I.R.R.'s claim for attorneys fees as prevailing party on plaintiff's 42 U.S.C. 1983 action is severed, subject to a conference to be scheduled by the Court.

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ADJUDGED, the Complaint is dismissed on the record.

ENTER

s/ Julius Vinik
JULIUS VINIK
J.S.C.

Filed: May 20, 1993

s/ William A. Lening
Clerk

No. 95-2044

(2)

Supreme Court, U.S.
FILED
JUL 19 1996
CLERK

IN THE

Supreme Court of the United States

October Term, 1995

LARRY RAY and JACQUELINE RAY,

Petitioners,

against

POLICE OFFICER BLAKE WILLETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION FOR THE SECOND DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS

STATEMENT OF THE CASE

The Amended Complaint against BLAKE J. WILLETT included claims for battery and false arrest/imprisonment and a civil rights cause of action pursuant to 42 U.S.C. §1983. After a post-trial traverse hearing the trial court dismissed the (one-year) causes of action based on battery and false arrest/imprisonment upon finding that the summons and complaint had not been properly and timely served upon BLAKE J. WILLETT.[1]

While the petitioners suggest (at page 5 of their brief) that the "amended complaint including the cause of action under 42 U.S.C. §1983 was properly served on Officer Willet," the trial court did not reach this issue. The defenses of improper service of process and limitations remain as alternative defenses to the civil rights claim. Defendant WILLET's cross claim against the co-defendant LONG ISLAND RAIL ROAD for indemnity was severed.

At the conclusion of the trial the jury was instructed (over objection by defense counsel) that Mr. RAY claims to have been deprived by BLAKE WILLETT, "of a right guaranteed by the Constitution of the United States, namely, the right to be free from bodily injury ..." (R 1724 [2], 1610-12). In order to find a

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[1] Counsel's failure to serve the original summons and complaint gives plaintiffs a potential cause of action for legal malpractice. Counsel for Petitioners are on notice of the need to review all applicable ethical obligations relating to the continued representation.

[2] References are to pages in the Record on Appeal to the Supreme Court of the State of New York Appellate Division for the Second Judicial Department.

civil rights violation the jury was further instructed that they need only find that the force used was "unnecessary" and that BLAKE WILLETT "acted under color of law" (R 1726-7). The Court explained that the harmful acts "must have been of a kind that occurred under the circumstances that would not have existed but for the fact that BLAKE WILLETT was a police officer using or purporting to use his official powers" (R 1335). Counsel for plaintiffs did not object to the jury instructions since they were substantially identical to the written Request For Jury Instructions submitted on behalf of plaintiffs (R 1931-34).

Testimony provided largely by Mr. RAY amply supported the jury's finding that the harmful acts were not committed under color of law.[3] The verbal dispute began over instructions relating to the locked bathrooms at the Long Island Rail Road level of Pennsylvania Station. The conversation took place only a few feet from the Long Island Rail Road police headquarters and Mr. RAY believed that he was being challenged to engage in a consensual fight (R 642, 648). Mr. RAY responded to the threat by saying, " ... What do you mean, I am not stupid. I am not going to get it on with you right here in front of the police office. ... Well, we could go to the loading docks" (R 520). According to Mr. RAY, defendant WILLETT was willing to fight "either now or later" (R 646). From this conversation alone the jury could have reasonably inferred that Mr. RAY agreed to fight, if and only if Police Officer WILLETT would forgo his authority as a police officer and engage in a private consentual fight outside of Long Island Rail Road property and removed from any Long Island Rail Road police presence.

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[3] Blake J. Willett offered testimony and evidence to contradict Mr. Ray's version of the facts but is not estopped from arguing and relying upon alternative and conflicting proof which may enure to his benefit.

Mr. RAY contended that after he originally consented to fight defendant, he continued with his work changing two sets of buckets and that at least five to seven minutes elapsed each time plaintiff changed the buckets (R 521). At 4:00 a.m. Mr. RAY's supervisor told him to go to lunch (R 523). At this point, plaintiff contends that the folloiwng exchange took place:

WILLETT: You are ready, let's go.

RAY: Go where?

WILLETT: Go to the loading docks.

RAY: Well, I am going to lunch.

(R 521-22). By virtue of the above exchange, the jury could have, but was not required to, find that appellant RAY withdrew his consent to go to the loading docks and to engage in a consentual fight.

After Mr. RAY told defendant WILLETT that he was going to lunch, Mr. RAY walked down the Hilton passageway. As Mr. RAY approached the Ogden Allied Office, he slowed down to get a hero sandwich for lunch and WILLETT allegedly said, "Come on, let's go. I am going to show you 'big mouth' when I tell you something, you are going to do it" (R 527). Although appellant RAY contended that he followed defendant WILLETT because "he was a police officer and I am supposed to do what he told me to do", the jury was free to reject this self-serving claim of police authority (R 528). The jury was free to find that defendant WILLETT was acting as a "bully" [as he was characterized by plaintiffs' counsel during summation] (at R 1675-76) and that defendant WILLETT had every intention of abandoning his role as police officer forcing plaintiff to adhere to the prior

agreement to go to the loading dock (or battery charge area) and engage in a consensual fight.

The reasonableness of a jury's finding in this manner was buttressed by Mr. RAY's contention that WILLETT turned off his police radio (R 530, 810), thereby clearly indicating that he had gone off duty as a police officer. It is also supported by Mr. RAY's contention that WILLETT took off all his articles of police clothing (i.e., gunbelt, shirt and bulletproof vest) when he arrived at the battery charge area and before any wrestling took place (R 529-30).

The jury's finding that police officer WILLETT did not act under color of law is also consistent with the finding that he was not acting within the scope of his employment. In affirming the dismissal of the complaint as to the co-defendant LONG ISLAND RAIL ROAD, the Appellate Division noted that, " ... liability will not attach where, as here, the tort is committed solely for personal motives of the employee unrelated to the furtherance of the employer's business. WILLETT'S act of taking RAY to a secluded area and beating him was a gross departure from his normal duties and fell well outside the scope of his employment" (citation omitted).

The jury also demonstrated a selective view of the evidence when it rejected plaintiffs' claims for future economic losses and made no award for future pain and suffering. Similarly, the mere fact that WILLETT eventually placed handcuffs upon Mr. RAY and brought him to police headquarters did not require a jury finding that the earlier harmful acts were done under color of law.

POINT I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED SINCE THERE HAS BEEN NO MISSTATEMENT OF THE LAW

The focus of the Petition rests upon a claimed misapplication of the law to a trial in which all of the critical facts were disputed. Essentially, Mr. RAY contended that he was unnecessarily subject to bodily harm, BLAKE WILLETT contended that he used proper force to make a lawful arrest and the LONG ISLAND RAIL ROAD contended that RAY and WILLETT engaged in a consensual fight while each was off duty.

On review of the jury's determination that defendant, WILLETT, did not act within the scope of his employment under color of law, the role of the Court was to determine whether there are any facts on which a reasonable jury might conclude that the acts were committed for essentially personal motives. Clearly, " ... acts of officers in the ambit of their personal pursuits are plainly excluded." Screws v. United States, 325 US 91, 111 (1945).

> Even in circumstances where jurors announce verdicts that are arguably inconsistent, courts are obliged to harmonize their findings on any reasonable interpretation that finds support in the evidence. See 9C. Wright & A. Miller, Federal Practice and Procedure §2513 (1971). That principle applies with even greater force to require acceptance of verdicts, fully supported by the evidence, that are claimed to be impaired only by speculative reasons why the jurors elected not to return verdicts on other counts. Rivera v. LaPorte, 896 F.2d 691, 694 (2nd Cir. 1990).

At issue is whether the acts were " . . . made possible only because the wrongdoer is clothed with the authority of state law". United States v. Classic, 313 US 299, 326 (1941) (emphasis added). In instructing the jury the Trial Court correctly explained that "the acts must have been of a kind [and] occurred under circumstances that would not have existed but for the fact that BLAKE WILLETT was a police officer using or purporting to use his official powers". (R 1335).

Both the Trial Court and the Appellate Division found sufficient evidence to support the verdict.

Rule 10 of the Rules of the Supreme Court of the United States provides that a petition for writ of certiorari will be granted only for compelling reasons including a situation where

> (c) a state court ... has decided an important question of federal law ... in a way that conflicts with relevant decision of this court.

Petitioners argue that the "Appellate Division's opinion is in direct conflict to this court's decision in Monroe v. Pape, supra, and the Second Circuit Court of Appeals decision in Rivera v. LaPorte, 896 F2d 691 (1990)", (see Petition at page 8). There is, however, nothing in the decision of the Appellate Division which suggests any change in the meaning of the phrase "color of law" as it is used in 42 USC §1983.

A review of the Appellate Division's decision shows that the Court simply found that plaintiffs did not "demonstrate that the defendant was acting 'under color of law' at the time of the act in question" (citation omitted). While the initial confrontation came about because WILLETT was present in his capacity as a police officer, the Court found sufficient evidence that the

harmful acts occurred after WILLETT stopped acting in his official capacity or while exercising his responsibilities pursuant to State Law.

The final sentence of Rule 10 cautions that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The gravamen of the instant petition amounts to nothing more than an asserted error in weighing the conflicting evidence. The trial judge and the four judges of the Appellate Division have been unanimous in their opinion. The New York Court of Appeals has also found no compelling reason to exercise its judicial discretion to review the determination.

CONCLUSION

The decision sought to be reviewed contains no misstatement of the rule of law. No compelling reason has been shown to grant review on writ of certiorari. Justice demands that finality be accorded the Decision and Order of the Appellate Division and that plaintiffs be placed in a position free to pursue any other cause of action available to them.

Dated: Merrick, New York
July 12, 1996

Respectfully submitted,

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